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No. _____

In The
Supreme Court of the United States
October Term, 1986

Elliott F. Rhodes,
Petitioner,
vs.
Dekalb County, Georgia;
Department of Public Safety,
Bureau of Police Services;
Captain E. E. McCart; and
DeKalb County Merit System,
Respondents.

On Petition For Writ Of
Certiorari to the United
States Court of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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I. STATEMENT OF CASE

A. Facts and Proceedings Below.

This is an employment discrimination case, brought by Elliott Rhodes, a black male formerly employed as a police officer in the DeKalb County Department of Public Safety. Rhodes filed suit against DeKalb County, Georgia, the County Department of Public Safety, Bureau of Police Services, the Dekalb County Merit System and Captain E. E. McCart (collectively referred to as the "County") alleging claims arising from his discharge from employment by the County.

Respondents disagree with and dispute the vast majority of facts set forth in the petition, but a complete refute of

Rhodes' facts is not necessary in light of his failure to raise any question subject for review. The salient facts are set out in the January 9, 1985 order of the District Court, and explain that petitioner did not file the instant complaint until August 15, 1983. Rhodes was discharged from employment by Dekalb County, Georgia on February 14, 1980, approximately three years prior to filing the instant complaint. At the time of his termination, Rhodes was notified of the discharge and advised of his right to appeal the decision to the DeKalb County Merit Council. He did not appeal the discharge decision, but rather filed a charge of discrimination with the EEOC.

Rhodes subsequently filed suit under Title VII, §§1981, 1983, 1985 and the Revenue Sharing Act, complaining of his termination. Petitioner Rhodes, while represented by counsel before the District Court, is proceeding pro se in this Court. While Rhodes sought in forma pauperis status before the lower courts, petitioner admits that he was not granted permission to proceed as a pauper. Petition for Certiorari, pp. xiii, 17. Both the District Court and the Court of Appeals denied petitioner's motion to proceed in forma pauperis.

B. The District Court's Decision.

A copy of the District Court's order granting partial summary judgment to the County is appended to this brief, since it was omitted by petitioner. The District Court dismissed Rhodes' non-Title VII claims as being barred by the statute of limitations, and held that material issues of fact remained concerning his Title VII claims. The court, sitting without a jury, tried Rhodes' Title VII claims and involuntarily dismissed the complaint for failure to make out a prima facie case of discrimination.

C. The Decision Of The U.S. Court Of Appeals For The Eleventh Circuit.

The Eleventh Circuit affirmed the District Court's decision, with modification to the rationale behind the statute of limitation bar. A copy of the opinion is appended to this brief, since petitioner did not append a complete copy. The Eleventh Circuit explained that the appropriate limitation period was the state personal injury statute as held in Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1985). Since the period of limitation was generally the same (two years) under the Georgia personal injury statute and the statute relied upon by the District Court, then the Court of Appeals found no error in the District Court's application of a two year period. The Court of Appeals affirmed the District Court's involuntary dismissal of petitioner's Title VII claims since it was not provided with a transcript for review.

II. REASONS FOR DENYING WRIT OF CERTIORARI

A. The Petition Should Be Denied Because The Statute Of Limitation Bars Substantive Review Of Petitioner's Alleged Due Process Claim.

Rhodes first asserts as an issue before this Court that he was denied a hearing concerning disciplinary matters in violation of his alleged constitutional rights. While the substance of the employee's claims are vehemently denied, especially since he was merely a probationary and not a permanent employee, Rhodes' claims for a hearing are barred by the statute of limitations governing his constitutional claims alleged pursuant to 42 U.S.C. §1983. A substantive review of the facts and argument concerning his alleged rights under the Due Process Clause is not warranted since this issue is precluded by the limitations bar. Moreover, Rhodes' due process claims are merely personal, and do not raise any issue of importance for review by this Court.

B. The Petition Should Be Denied Because Petitioner Is Not A Pauper And Is Not Entitled To A Free Transcript In An Employment Discrimination Case.

Certiorari should be denied based on Rhodes' claims for a transcript at government expense because petitioner has never been granted in forma pauperis status, and in fact, his applications were specifically denied by the District Court and Court of Appeals. Rhodes' arguments are wholly directed to his need for a copy of the trial transcript, and fail to raise any issue as to the lower courts' determination that he would not be allowed to proceed in forma pauperis.

Even if Rhodes were to allege that the denial of pauper status was improper, clearly, the lower courts' exercise of discretion in denying in forma pauperis status to Rhodes is not an issue of importance to anyone other than Rhodes. Moreover, the record reveals that Rhodes is a licensed real estate broker, with adequate resources to pursue his alleged claims. This court has clearly explained the parameters for determining whether a party may proceed in forma pauperis, and no further attention is warranted or raised by the instant claim. Cruz v. Hauck, 404 U.S. 59, 92 S.Ct. 313 (1971); Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917 (1962). Of course, a determination of whether a right to receive a free transcript exists is moot in light of petitioner's inability to convince the lower courts of his alleged pauper status, and the petition should therefore be denied.

C. The Petition Should Be Denied Because Rhodes' Non-Title VII Claims Are Barred By The Statute Of Limitations, And The Retroactive Application of Wilson v. Garcia Was Not Raised In The Lower Courts And Is Not Appropriate For Further Review.

Rhodes' claim for review based on the statute of limitations fails to recognize that his civil rights claims for damages would have been barred regardless of the choice of statute (since the time periods are identical), and that the retroactive application of Wilson v. Garcia, 471 U.S. 161, 105 S.Ct. 1938 (1985), to the Georgia statutes is consistent with the Court of Appeal's decisions. The Court of Appeals correctly affirmed the dismissal of petitioner's non-Title VII claims because the Georgia two-year personal injury statute of limitations is an applicable bar regardless of the District Court's use of the twelve month limitation or two/twenty year limitations. O.C.G.A. §9-3-33 (two year limitation period for personal injury); O.C.G.A. §36-11-1 (twelve month limitation for filing suits against counties); O.C.G.A. §9-3-22 (two year limitation on damage suit for wages, twenty year limitation for seeking injunctive relief).

It is simply not disputed that petitioner did not file his claims pursuant to §§1981, 1983 or 1985 until more than three years after the cause of action arose (i.e., his discharge from employment). Under Wilson v. Garcia, the state personal injury statute applicable to petitioner's claim is two years, clearly barring his complaints. O.C.G.A. §9-3-33.

While Rhodes attempts to argue that the Wilson v. Garcia decision should not be applied retroactively (thereby reviving his claim for injunctive relief only), the argument was not pursued at either lower tribunal. As petitioner points out, Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 355 (1971), details the process to be used in determining the retroactive application of a judicial decision. The factors enumerated in Chevron Oil encompass a variety of considerations that would vary from state to state, and case to case. The retroactive application of Wilson v. Garcia is not a question readily susceptible to uniform application throughout the states, since whether a limitation period had been clearly established prior to Wilson v. Garcia would differ in different jurisdictions.

The issue of applying Wilson v. Garcia retroactively is best left to the various Courts of Appeal. The Eleventh Circuit Court of Appeals has reviewed the Georgia limitation statutes in question in the instant case, and held Wilson v. Garcia to apply retroactively when using Georgia statutes. Williams v. City of Atlanta, 794 F.2d 624 (11th Cir. 1986). The Eleventh Circuit acknowledged that the "propriety of retroactive application of Wilson v. Garcia may vary from state to state." Williams, supra, 796 F.2d 626, n. 3. Furthermore, the retroactive application of Wilson v. Garcia serves the purposes of the decision in creating certainty regarding limitation periods.

In the instant case where neither the trial court nor the Court of Appeals were presented with petitioner's claim against retroactive application, and where the Eleventh Circuit has reviewed the Georgia limitations statute to conclude that retroactive application of Wilson v. Garcia is appropriate, then no basis for granting certiorari exists under the instant petition.

D. The Petition Should Be Denied Because The Question Of Whether The Statute Of Limitations Should Be Tolled On Civil Rights Claims While The Case Is Pending At The EEOC Has Been Decided Previously In Johnson v. Railway Express Co., Inc.

Rhodes' fourth basis for seeking a writ is without merit because this Court has previously decided a similar issue adverse to petitioner. Rhodes argues that the period for pursuing his civil rights claims (§§1981, 1983 and 1985) should have been tolled while his Title VII claims were pending at the EEOC. In Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716 (1978), this Court clearly explained that the filing of a charge with the EEOC does not serve to toll civil rights claims brought pursuant to §1981.

The Court of Appeals correctly explained that it has previously construed Georgia law to provide that Title VII actions do not toll the statute of limitations on §1981 claims. Howard v. Roadway Express, Inc., 726 F.2d 1529, n.1 (11th Cir. 1984). As the Court of Appeals noted, Rhodes has failed to present any Georgia law that would require tolling of his non-Title VII claims during the EEOC investigation. See Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1798 (1980). Since the Johnson rationale is equally applicable (if not expressly then certainly implicitly) to claims brought pursuant to §§1983 and 1985, and since Rhodes has failed to assert any basis in Georgia law to support tolling of his claims, then the case merits no additional attention from this Court.

E. The Petition Should Be Denied Because The Failure To Make Out A Prima Facie Case Of Race Discrimination Is Merely A Factual Claim, Not Raising Any Issue Deserving Review.

Rhodes' final question urged for consideration is whether the trial court's involuntary dismissal of his Title VII claims was factually proper. 42 U.S.C. §2000e. Clearly, this provides no basis for attention of the Supreme Court. Prior to dismissing the Title VII claims, the District Court conducted a trial on the merits of his Title VII claims, heard witnesses and received documentary evidence. At the close of Rhodes' case, the District Court granted the County's motion for involuntary dismissal because Rhodes failed to make out a prima facie case.

While the County strongly contends that the evidence presented at the trial clearly supports the District Court's dismissal of the case, Rhodes' failure to provide the Court of Appeals with a copy of the trial transcript precluded any further review of his factual allegations. United States v. Dallas County Commission, 739 F.2d 1529, 1540 (11th Cir. 1984). Rhodes' discharge resulted from his failing to

comply with and violating the valid rules and regulations of the police department, which were presented to the District Court by Rhodes in detail. The District Court noted both the failure of Rhodes to dispute his violation of County police rules and orders, as well as his lack of credibility at trial. Rhodes has pursued numerous avenues of relief (a four day County grievance panel hearing, unemployment compensation administrative appeals, and Revenue Sharing Act review) all of which strongly affirmed Rhodes' termination. Rhodes' factual claims are without merit, as determined by the District Court, and no further review of his claims is warranted.

III. CONCLUSION

The petition for a writ of certiorari should be denied because it raises issues that are merely personal to petitioner, and that have been resolved properly by the lower courts.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8801
Non-Argument Calendar

ELLIOTT F. RHODES,

Plaintiff-Appellant,

versus

DEKALB COUNTY, GEORGIA, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(November 19, 1986)

Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

PER CURIAM:

This is an appeal from a summary judgment in favor of defendents in an action brought under 31 U.S.C. § 6721 (the Revenue Sharing Act) and 42 U.S.C. §§ 1981, 1983 and 1985, and from an involuntary dismissal, pursuant to Rule 41(b), Fed. R. Civ. P., of a Title VII claim. Plaintiff brought suit against his former employer, DeKalb County, Georgia, Captain E.E. McCart of the DeKalb County Bureau of Police Services, and the DeKalb County Merit System Council. Plaintiff alleged, inter alia, that he was discharged because of his race and in retaliation for filing a previous charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The defendant answered, inter alia, that the complaint was barred by applicable statutes of limitations and filed a motion for summary judgment with supporting affidavits.

Upon review of all the pleadings and supporting affidavits, the district court granted partial summary judgment, dismissing all defendants except DeKalb County and all claims except those brought under Title VII. The Title VII matter was then tried by the court sitting without a jury. The court granted DeKalb County's motion for involuntary dismissal, holding that plaintiff failed to establish a prima facie case of discrimination.

Plaintiff contends that the district court erred in granting summary judgment for defendant McCart because a genuine issue of disputed fact existed as to McCart's involvement in plaintiff's discharge -- whether plaintiff had informed McCart that plaintiff would be late for work one day. Plaintiff had no claim against McCart under Title VII because McCart was not plaintiff's employer. Johnson v. Richmond County, 507 F. Supp. 993, 995 (S.D. Ga. 1981) vacated in part on other grounds, No. 83-8224 (April 16, 1984) (unpublished opinion); see Allen v. Lovejoy, 553 F. 2d 522, 525 (6th Cir. 1977). For the same reason plaintiff did not have a claim against McCart under the Revenue Sharing Act. See 31 U.S.C. § 6716(a), (b).

Plaintiff's only claims against McCart were brought under 42 U.S.C. §§ 1981, 1983 and 1985.[1] The district court found that these causes of action were barred by the Georgia statute of limitations, O.C.G.A. § 9-3-22,[2] which provides for a two-year limitations period on claims for damages. Since § 1983 actions are considered personal injury actions for statute of limitations purposes, Wilson v. Garcia, 471 U.S. 261 (1985), the district court should have applied the Georgia personal injury limitations period codified at O.C.G.A. § 9-3-33 (1982). Williams v. City of Atlanta, 794 F.2d 624 (11th Cir. 1986). The district court should have likewise applied O.C.G.A. § 9-3-33 to the §§ 1981 and 1985 claims. See id. at 625, n.1 (by implication). Georgia Code § 9-3-33, however, also provides for a two-year limitations period. The plaintiff filed the present action more than three years after the claims arose, and the lower court's error was therefore without effect. Since the statute of limitations barred plaintiff's only legally cognizable claims against McCart, no genuine issue of disputed fact remained, and summary judgment was proper.

Plaintiff next contends that the district court erred when it held that O.C.G.A. § 36-11-1, the Georgia twelve-month statute of limitations on actions against counties, barred his non-Title VII claims against DeKalb County. Plaintiff argues that the court should have applied the statute of limitations found at O.C.G.A. § 9-3-22.[3] In support of this argument plaintiff cites Solomon v. Hardison, 746 F.2d 699, 705 (11th Cir. 1984) and Whatley v. Department of Education, 673 F.2d 873, 878 (5th Cir. 1982). These cases are inapplicable, however, because they did not involve § 1983 actions against counties. If, as plaintiff argues, the statute of limitations on actions against counties is not applicable, Wilson v. Garcia, 471 U.S. 261, requires application of the personal injury limitations period.[4] Plaintiff does not argue that the district court erred in applying O.C.G.A. § 9-3-22 to his purported Revenue Sharing Act claim.[5]

Plaintiff contends that because he was a member of two pending Title VII class actions against DeKalb County, these pending claims should have tolled the relevant statute of limitations on his non-Title VII claims. This court held, in a similar case arising in Georgia, that pending Title VII actions do not toll the statute of limitations on § 1981 claims. Howard v. Roadway Express Inc., 726 F.2d 1529, n.1 (11th Cir. 1984). The court in Howard was following the Supreme Court decision in Johnson v. Railway Express Agency, 421 U.S. 454, which similarly held that pending Title VII actions did not toll the applicable statute of limitations on § 1981 actions brought in Tennessee. Plaintiff fails to direct this court to any Georgia statute or case dictating that pending Title VII actions toll the statute of limitations on non-Title VII claims. Thus we hold that the statute of limitations was not tolled. See Board of Regents v. Tomanio, 446 U.S. 478, 485-86 (1980) (state law controls tolling of state statute of limitations in § 1983 cases).

Plaintiff contends that the district court erred in holding that he failed to establish a prima facie case of discrimination under Title VII. Plaintiff has failed, however, to provide a transcript of the evidence on which the district court made its findings. Since this court does not have a complete record of the trial proceedings, we are not able to review this contention and must affirm the district court decision. United States v. Dallas County Commission, 739 F.2d 1529, 1540 (11th Cir. 1984).

AFFIRMED.

FOOTNOTES

1/ Plaintiff may not have had a claim under 42 U.S.C. § 1985. See Nation v. Winn Dixie Stores, 567 F. Supp. 997 (N.D. Ga. 1983) (employee cannot conspire with his or her employer in violation of § 1985).

2/ Section 9-3-22 provides the limitations period on causes of action arising under statutes for the enforcement of rights and the recovery of wages and other damages.

3/ O.C.G.A. § 9-3-22 provides for a two-year limitations period on damage claims and a 20-year period on claims for equitable relief. Thus plaintiff's argument is apparently designed to avoid the bar of his claim for reinstatement, since application of either O.C.G.A. § 9-3-22 or § 33-11-1 would bar plaintiff's claim for damages.

4/ Wilson v. Garcia probably requires application of O.C.G.A. § 9-3-33, the personal injury limitations period, even if the action is filed against a county. In applying O.C.G.A. § 36-11-1, the limitations period on actions against counties, the district court followed the reasoning in Whatley v. Dep't of Education, 673 F. 2d 873 -- a case that was decided well before the Supreme Court decision in Wilson. Whatley held that since Georgia law required application of § 36-11-1, the federal courts were required to apply this section. Wilson v. Garcia seems to require application of the personal injury limitations period regardless of the particular dictates of state law.

Since plaintiff's claims however are equally barred by O.C.G.A. §§ 9-3-33 and 36-11-1, we find no need to reach a holding on this issue at this time.

5/ The district court did not directly address the issue of the appropriate statute of limitations for claims under the Revenue Sharing Act. It is only implicit in the district court's holding that plaintiff's claim under the Revenue Sharing Act is barred by O.C.G.A. § 33-11-1. While this court does not adopt the district court's implicit position, the plaintiff fails to adequately argue the point and we need not address the issue. Even if the unargued point involves a potential error it is without injury since plaintiff also failed to show that the district court erred in holding that he did not prove a prima facie case of discrimination.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELLIOTT F. RHODES,

Plaintiff,

vs.

DEKALB COUNTY, GEORGIA DEPARTMENT OF PUBLIC SAFETY, BUREAU OF POLICE SERVICES, et al.,

Defendants.

CIVIL ACTION

No. C 83-1717 A

ORDER

This is an action brought pursuant to the Revenue Sharing Act, 31 U.S.C. § 6721, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq., and 42 U.S.C. §§ 1981, 1983, and 1985. Although the complaint states that this is a "proceeding for a declaratory judgment," it is in actuality a suit for backpay and injunctive relief. Pending before the court is the defendants' motion for summary judgment.

I. FACTUAL BACKGROUND

The plaintiff was employed by DeKalb County, Georgia, as a police officer on January 23, 1979. He was terminated on or about April 2, 1979, allegedly for failure to pass the firearms course. The plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission and after a fact-finding conference reached a settlement with DeKalb County, which included reinstatement to his position as a police officer.

On July 20, 1979, the plaintiff reported to Captain McCart to be reassigned to the Training Division; he was told to report to work on Monday, July 23. After a discussion about giving notice to his current employer, the plaintiff was told to report to work on July 24. The plaintiff reported late to work on July 24, and there is a conflict in the evidence as to whether the plaintiff had called Capt. McCart's office earlier to report that he would be late. The plaintiff was written up for being AWOL and was suspended without pay for that day. The plaintiff also alleges that his reinstatement was not immediate following the settlement of his EEOC charge, causing him to earn substantially less, this underpayment resulting in a disparity in starting salary as compared to other members of the police department.

In February 1980 the plaintiff informed Sgt. S.F. Schildecker that he had not received certain benefits to which he felt he was entitled, viz., one year anniversary pay increase and an additional incentive for two years of college credit.

On February 13, 1980, the plaintiff was notified that he would be dismissed from employment with Dekalb County as of February 14. That letter detailed the reasons for the dismissal and further notified the plaintiff that he had ten days in which to appeal the termination to the DeKalb County Merit System Council. The plaintiff did not appeal his termination to the council.

On February 21, 1980, the plaintiff filed a discrimination charge with the EEOC, in which he alleged that he was discharged because of his race and that his discharge was the result of his having filed a previous charge with the EEOC. The employer listed on the EEOC charge was "DeKalb County Police Department"; the only reference to Capt. McCart in the charge was the fact that he had written up the plaintiff for tardiness upon his first day of reinstatement. The plaintiff alleges that he was treated differently from other employees, in that other police officers were tardy to class and performed poorly during their training

sessions; he also alleges that he was charged with insubordination when others who had performed the same acts were not.

The plaintiff requested and was afforded a hearing on his termination before a department grievance committee in accordance with court order procedures established in Association of Law Enforcement Officers, Inc. v. Hand, Civil Action No. C79-2313A (N.D. Ga.). After a formal hearing before the grievance committee, the committee unanimously recommended that the plaintiff's termination stand. The plaintiff was notified of this decision by letter dated December 9, 1980.

II. PROPER PARTIES DEFENDANT

The DeKalb County Police Department (or, as it is now known, Bureau of Police Services) is not a legal entity capable of suing or being sued. The plaintiff was employed as a police officer in the department by Dekalb County, and in a suit charging discrimination or retaliation in employment, Dekalb County is the proper party defendant.

On August 2, 1979, Capt. McCart was transferred and became commander of the police department's Communication Division. After that time he had no further responsibility over the Training Division and had no personal involvement in, control over, or knowledge of the incidents surrounding the plaintiff's termination on February 14, 1980. The only cause of action which the plaintiff could assert against Capt. McCart would be with respect to his one-day suspension on July 24, 1979. To the extent that the plaintiff seeks relief under Title VII and the Revenue Sharing Act, his cause of action is clearly against DeKalb County, his employer. Allen v. Lovejoy, 553 F. 2d 522 (6th Cir. 1977); Johnson v. Richmond County, 507 F. Supp. 993 (S.D. Ga. 1981).

Even assuming that the plaintiff's complaint states a cause of action against Capt. McCart under 42 U.S.C. §§ 1981 and 1983, such claims are barred by the applicable two-year statute of limitations as discussed below. Even assuming that the plaintiff's conspiracy claim under 42 U.S.C. § 1985 is not barred by the applicable statute of limitations, this court finds that Officer McCart is entitled to summary judgment, since an entity cannot conspire with its own employees in violation of section 1985. Nation v. Winn-Dixie Stores, Inc., 567 F. Supp. 997 (N.D. Ga. 1983).

In his complaint the plaintiff alleges that the DeKalb County Merit System "governs the personnel and employment policies of the Dekalb County, Georgia, Department of Public Safety, Bureau of Police Services, which discriminate against plaintiff." In their brief in support of their motion for summary judgment, the defendants point out that there is no such entity as the "DeKalb County Merit System". There is an appointed body empowered under state law to hear employee personnel appeals, which is denominated the Dekalb County Merit System Council. That council is composed of citizen members, appointed by the governing authority of DeKalb County and is authorized only to hear personnel appeals and to submit recommendations to the county governing authority regarding rules and regulations affecting the merit system. It has no authority to hire, discipline, or fire employees. In his brief in opposition to the defendants' motion, the plaintiff nowhere discusses his claims against the Merit System Council, and the court finds that he has abandoned any alleged claim against the council. Consequently, the DeKalb County Merit System Council, denominated as the "DeKalb County Merit System" in the plaintiff's complaint, is entitled to summary judgement.

III. STATUTES OF LIMITATION

Since there is no statutory period of limitations found in 42 U.S.C. §§ 1981 and 1983, the federal courts must look to the most applicable period of limitations under state law.

Johnson v. Railway Express Agency, Inc. 421 U.S. 454, 95 S. Ct. 1716 (1975).

The defendants urge this court to apply the twelve-month limitations period found in O.C.G.A. § 36-11-1, which provides in relevant part, "All claims against counties must be presented within 12 months after they accrue or become payable or the same are barred...." The plaintiff argues that a twelve-month limitation period is violative of public policy and argues, in the alternative, that plaintiff was a member of a class action suit that was pending during the twelve-month period and that this suit provided notice to the county.

The Eleventh Circuit has held that ordinarily the Georgia statute of limitations codified at O.C.G.A. § 9-3-22 will apply in employment discrimination cases. That statute provides for a two-year limitation period for the recovery of wages and damages and for a twenty-year period for injunctive relief. Solomon v. Hardison, 746 F. 2d 699 (11th Cir. 1984); Whatley v. Department of Education, 673 F. 2d 873 (5th Cir. 1982) (Unit B). However, in those cases the county was not a defendant, and the court did not have occasion to discuss whether O.C.G.A. § 36-11-1 should apply. In Whatley the court noted that in choosing which state statute of limitations to apply a court must engage in a two-step analysis: first, the court must determine the "essential nature" of the claim and, second, what statute of limitations the state courts would hold applicable to this type or class of claim. Undoubtedly, under the "essential nature" prong of the analysis, the twenty-two year period of limitations in O.C.G.A. § 9-3-22 would be applicable. However, if such claims were presented against a county, the state courts would undoubtedly apply the twelve-month limitation period found in O.C.G.A. § 36-11-1. The only exception to the twelve-month limitation period is for claims when the right to the amount of the claim is fixed by law, such as a claim for a salary when the salary is

established by law. Salmons v. Glasscock County, 161 Ga. 893 (1926); Stelling v. Richmond County, 81 Ga. App. 571 (1950). This court further notes that the twelve-month limitation period is not an adminstrative statute of limitations but is applicable to those situations when a person seeks to file a judicial complaint. Consequently, the rationale of Burnett v. Grattan, _____ U.S. _____, 104 S.Ct. 2924 (1984), and Solomon v. Hardison, 746 F. 2d 699 (11th Cir. 1984), is inapplicable.

Furthermore, the plaintiff has not cited any case wherein a court has found a twelve-month limitation period with respect to discrimination claims to be void as against public policy, and this court declines to so hold.

The plaintiff asserts that his membership in a class action lawsuit should toll the statute of limitations. By order dated August 31, 1983, in Winkler v. County of DeKalb, Civil Action No. C79-476A, the court stated that Elliott Rhodes "has asked that he be allowed to opt out of this class action and pursue his claims in the context of an individual Title VII suit."

That action was a Title VII action and is, therefore, inapplicable to any claims asserted by the plaintiff under the Revenue Sharing Act or 42 U.S.C. §§ 1981 and 1983.

All acts complained of by the plaintiff occurred prior to February 21, 1980, the date on which he filed his discrimination charge with the EEOC, and this suit was not filed until August 15, 1983. The filing of a charge with the EEOC does not toll the running of the statutes of limitation for non-Title VII actions. Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790 (1980).

For the foregoing reasons, the defendants are entitled to summary judgment dismissing the plaintiff's claims under the Revenue Sharing Act and 42 U.S.C. §§ 1981 and 1983.

IV. GENUINE ISSUES OF MATERIAL FACT

Although DeKalb County has fully and carefully documented its reasons for terminating the plaintiff, the plaintiff has made sufficient factual allegations to raise a genuine issue of material fact as to whether he was treated differently than other similarly situated people and that such treatment may have been for the purpose of retaliation. This court makes no determination as to whether the plaintiff will eventually prevail on its allegations; the court simply finds that his allegations are sufficient to withstand a motion for summary judgment as to such allegations.

V. SUMMARY

The plaintiff's complaint either states no cause of action or such causes of action are barred by the applicable statutes of limitation with respect to Capt. McCart and the Dekalb County Merit System Council. Consequently, these parties are entitled to summary judgment, dismissing the plaintiff's claims against them with prejudice. Dekalb County, not its Department of Public Safety or Bureau of Police Services, is the proper party defendant, and will be substituted for the Department of Public Safety and Bureau of Police Services. DeKalb County's motion for summary judgment with respect to the plaintiff's Revenue Sharing Act and 42 U.S.C. §§ 1981, 1983, and 1985 claims is GRANTED, and those claims will be DISMISSED with prejudice. DeKalb County's motion for summary judgment with respect to the plaintiff's claims under Title VII is DENIED.

SO ORDERED, this 7th day of January, 1985.

s/

ROBERT L. VINING, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELLIOTT F. RHODES, Plaintiff, vs. DEKALB COUNTY, et al., Defendants.	CIVIL ACTION No. C 83-1717 A

ORDER

Pending before the court in this discrimination case is defendants' application for award of attorney's fees, the plaintiff's motion to review taxation of costs, the plaintiff's motion to proceed on appeal in forma pauperis, and the plaintiff's motion for a transcript at government expense.

Although this court granted the defendants' motion for involuntary dismissal at the close of the plaintiff's case, the court finds that the plaintiff's case was not so frivolous, unreasonable, or without foundation that an award of attorney's fees to the defendant would be justified. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978). As the Supreme Court noted in Christianburg Garment, attorney's fees may not be awarded to a prevailing defendant simply because the plaintiff ultimately lost his case; the court must find that the action was groundless or without foundtion. For these reasons, the defendants' motion for attorney's fees is DENIED.

With respect to the plaintiff's motion to proceed on appeal in forma pauperis, the court notes that neither in his motion to proceed in forma pauperis nor in his notice of appeal does the plaintiff assert any basis for an appeal to be taken in this case. The court further notes that the unsigned

affidavit mentioned in the motion to proceed in forma pauperis shows that the plaintiff has sufficient property and/or the capacity (as a real estate broker) to earn more than he has shown as his present income (the plaintiff's 1982 income tax return submitted at trial indicating that he earned $11,500 in that year). Since the court finds that the plaintiff's appeal is without merit and that he has not met the financial requirements that would entitle him to proceed in forma pauperis, the plaintiff's motion to proceed on appeal in forma pauperis is DENIED.

Since the court has denied the plaintiff's motion to proceed on appeal in forma pauperis, the court also DENIES his motion for a trial transcript at government expense.

The plaintiff has objected to the clerk's taxation of costs asking that the witness fee in the amount of $405.00 be disallowed. In his objection the plaintiff notes that the witness did not testify and that, therefore, that cost should be disallowed.

Although the witness did not actually testify, this was only because the court granted the defendants' motion for involuntary dismissal following the close of the presentation of the plantiff's case. The potential witness was the Assistant Director of DeKalb County's police academy and was in charge of the day to day operations of the academy; as such, he had personal knowledge of most of the incidents which formed the basis of the plaintiff's termination, and it was he who actually recommended the plaintiff's termination to the department director. Consequently, the court finds that although this potential witness did not actually testify, the defendants are entitled to reimbursement for his travel and subsistence. Travel expenses incurred by a witness are taxable as costs, 28 U.S.C. § 1821(c)(4). Additionally, the witness is allowed a subsistence allowance in addition to the normal $30 per diem witness fee. 28 U.S.C. § 1821(d).

Since the court finds that the witness fees taxed as costs by the clerk are proper, the defendant's motion to review taxation of costs is DENIED.

In summary, the defendants' application for an award of attorney's fees is DENIED; the plaintiff's motions to proceed on appeal in forma pauperis, for preparation of the trial transcript at government expense, and to review the clerk's taxation of costs are DENIED.

SO ORDERED, the 4th day of December, 1985.

s/

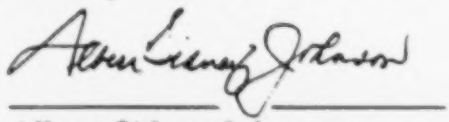
ROBERT L. VINING, JR.
United States District Judge

CERTIFICATE OF SERVICE

As a member of the Bar of The United States Supreme Court, I hereby certify that on the 21st day of July, 1987, three copies of the enclosed Respondents' Brief In Opposition to Petition for Writ of Certiorari were mailed first class, postage prepaid, to:

Elliott F. Rhodes
3838 Flat Shoals Road
Decatur, Georgia 30034

I further certify that all parties required to be served have been served.



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